

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

FLOWER MANGIALARDI, et al. PLAINTIFFS

V. CIVIL ACTION NO. 2:02CV121-B-B

HAROLD'S AUTO PARTS, INC., et al. DEFENDANTS

MEMORANDUM OPINION

This cause comes before the Court upon the plaintiffs' motion and supplemental motion for expedited remand of non-federal question plaintiffs. Upon due consideration of the motions, responses, memoranda, exhibits, and oral arguments, the Court is ready to rule.

Procedural History

This case involves asbestos-related personal injury claims brought by the plaintiffs against more than one hundred defendants in the Circuit Court of Bolivar County, Mississippi. On June 5, 2002, several defendants removed the plaintiffs' consolidated claims to this Court. The defendants asserted that the claims of at least two of the plaintiffs, John Adamson and Greely Smith, were subject to "federal enclave" jurisdiction because those plaintiffs had been allegedly exposed to asbestos during their employment at such federal enclaves as the United States Postal Service and the Tennessee Valley Authority. The other defendants joined or consented to this removal and some asserted "federal officer" jurisdiction as an additional ground for removal. The plaintiffs filed a motion to remand or, in the alternative, to sever which remains under this Court's consideration. Subsequently, on August 6, 2002, the plaintiffs filed the present motion for expedited remand of all "non-federal-question plaintiffs" and filed the supplemental motion on September 20, 2002. An emergency hearing was held on October 2, 2002. At the close of this hearing, the Court granted the parties five days in which to submit additional arguments in support of their respective positions on whether the non-federal-question plaintiffs should be severed. A conditional transfer order from the Panel on Multi-District Litigation has been entered in

this case.

Analysis

Several motions are currently pending before the Court in this matter, and there is considerable overlapping of arguments in the various motions and memoranda; thus, for the sake of clarity, the Court reiterates that this ruling pertains only to the plaintiffs' motion and supplemental motion for expedited remand of the non-federal-question plaintiffs. The parties have focused extensively on the issue of federal enclave and federal officer jurisdiction and whether the plaintiffs have effectively waived those claims. This debate will be more fully addressed by this Court in its forthcoming ruling on the plaintiffs' original motion to remand *all* of the plaintiffs. The Court, however, presently withholds its ruling in that matter. The question before the Court in the present motion is whether to remand the plaintiffs which are alleged to have had no federal exposure. The effectiveness, or lack thereof, of the waiver of federal claims does not directly affect these plaintiffs but is, however, collateral to the issues discussed below and shall be addressed accordingly.

The defendants argue that these plaintiffs should not be severed because additional discovery is necessary to determine which parties have had federal exposure. The defendants further argue that the plaintiffs voluntarily consolidated these cases in state court and should not be allowed to manipulate the court system by severing the parties now.

As to the discovery issue, the Court is unpersuaded by the defendants' argument for two reasons. First, the plaintiffs have represented to this Court without conceding the issue of federal jurisdiction that only twenty-seven of the approximately 245 plaintiffs have worked in any environment that could possibly give rise to federal enclave or federal officer jurisdiction. The Court is inclined to accept the veracity of this representation which was made in various motions and memoranda currently before this Court and in open court at the emergency hearing. Second, the plaintiffs have provided the work histories of all the plaintiffs. The existence of federal enclave and/or federal officer jurisdiction depends on the nature of the site where each plaintiff was exposed. Work history is the only relevant discovery which would be germane to the issue of federal exposure. Since this discovery has been

produced, the Court finds no merit to the defendants' argument on this point. Further, if the waiver of federal claims is deemed effective, any argument regarding lack of discovery as this issue pertains to remand would be moot.

The defendants take issue with the fact that the plaintiffs voluntarily consolidated this case and now want to sever to avoid federal court. The defendants accuse the plaintiffs of tactical manipulation and cite Boelens v. Redman Homes, Inc., 759 F.2d 504 (5th Cir. 1985), in which the Fifth Circuit warns that such activity "cannot be condoned." Boelens, 759 F.2d at 507. The court states:

[T]he majority view is that a plaintiff's voluntary amendment to a complaint after removal to eliminate the federal claim upon which removal was based will not defeat federal jurisdiction. The policy behind this rule is obvious. When a plaintiff chooses a state forum, yet also elects to press federal claims, he runs the risk of removal. A federal forum for federal claims is certainly a defendant's right. If a state forum is more important to the plaintiff than his federal claims, he should have to make that assessment before the case is jockeyed from state court to federal court and back to state court.

Id. This Court does not find in the present case the type of "tactical manipulation" referenced in Boelens. The present plaintiffs did not amend their complaint after removal but rather disavowed any federal claims in paragraph eight of their original complaint and in each amended complaint filed thereafter. Indeed, the plaintiffs in the present case have followed the Fifth Circuit's directive by making the assessment of whether the state forum is more important than their federal claims. In the original complaint and in each amended complaint subsequently filed, the plaintiffs stated:

The Federal Courts lack subject matter jurisdiction over this action, as there is no federal question and incomplete diversity of citizenship due to the presence of a Mississippi defendant. Removal is improper. Every claim arising under the Constitution, treaties, or laws of the United States is expressly disclaimed (including any claim arising from an act or omission on a federal enclave, or of any officer of the U.S. or any agency or person acting under him occurring under color of such office). No claim of admiralty or maritime law is raised. Plaintiffs sue no foreign state or agency. Venue is proper in Bolivar County, Rosedale District.

Without making a determination regarding the effectiveness of the waiver, the Court finds that the plaintiffs' initial joint filing followed by their subsequent attempt to sever, though inconsistent, is no legal

ground for denying remand of the non-federal-question plaintiffs. Since the plaintiffs have stipulated that they will not pursue any federal claims, should any of these plaintiffs' alleged injuries be proven at trial to have resulted from federal exposure, the fact-finder is precluded from considering those injuries in the calculation of damages. Just as a plaintiff who stipulates damages in an amount less than \$75,000 to avoid diversity jurisdiction cannot later claim greater damages in state court, the plaintiffs in the present case cannot now disclaim their federal causes of action and later argue damages caused by federal exposure.

The forgoing analysis raises serious doubts as to whether the Court should retain *any* of the plaintiffs in this matter. Certainly, at least, it is clear that the non-federal-question plaintiffs should be remanded. The Court finds it inherently unfair to require these plaintiffs to have their Mississippi state law claims tried in a distant state simply because a very small minority of their co-plaintiffs have had federal exposure. Such a requirement would subject the plaintiffs to obvious prejudice, while the reverse holding would not prejudice the defendants.

Courts within the Fifth Circuit have severed similar "non-federal-question" plaintiffs in other asbestos cases. Such action was taken in Madden v. Able Supply Co., 205 F. Supp. 2d 695 (S.D. Tex. 2002). In Madden, the court found that the plaintiffs' state law claims "substantially predominated" and stated that "[k]eeping these claims in federal court will not increase efficiency and expediency. Rather, the opposite is true." Madden 205 F. Supp. 2d at 702. The court then declined to exercise its supplemental jurisdiction over the claims.

Defendant Viacom, successor to Defendant Westinghouse, attempts to distinguish Madden on the grounds that only one federal plaintiff was involved as opposed to twenty-seven, that the claims had been pending for over two years and extensive discovery had been completed, and that the Madden court retained all of the plaintiff's claims against Westinghouse. The plaintiffs in the present case urge the Court to retain jurisdiction over both Westinghouse and non-Westinghouse claims as to a certain group of plaintiffs while remanding both Westinghouse and non-Westinghouse claims as to other plaintiffs.

First, the Court finds no merit to Defendant Viacom's argument regarding plaintiff "numbers." While there was only one federal plaintiff in Madden, there were also only forty-one plaintiffs in total. There are approximately 245 plaintiffs in the present case. Twenty-seven of 245 is not an unreasonable stretch from one of forty-one. Second, the discovery issue has been discussed above, and the Court is satisfied with the plaintiffs' representation and production of work histories. Third, regarding the distinction between the two groups of plaintiffs and their "Westinghouse" and "non-Westinghouse" claims, the Court finds that this distinction is not material and that Defendant Viacom will not suffer significant prejudice particularly when any potential prejudice is compared to the prejudice the non-federal-question plaintiffs will suffer if forced to try their state law claims in a distant state.

It should also be noted that while Madden is, indeed, distinguishable from the present case, that distinction is not in the defendants' favor. The Madden court did retain all of the plaintiff's claims against Westinghouse. The court noted, however, that the plaintiff waived her claims against Westinghouse in her motion to remand rather than in her complaint, thus rendering the waiver ineffective. The court accepted the plaintiff's claims "as alleged in her state court Petition (as it existed at the time of removal) for purposes of determining whether remand [was] proper." Id. at 699, n. 3. Though the Court temporarily reserves its ruling regarding the federal plaintiffs and the effectiveness of their waiver, the Court finds this distinction between Madden and the present case significant. The implication in Madden is that the entire cause of action would have been remanded if the plaintiff had waived her federal claims at the time the complaint was filed. The Court is, therefore, unconvinced by Defendant Viacom's attempt to dissuade it from following the Madden court's lead in severing non-federal-question plaintiffs from federal plaintiffs.

As mentioned above, the forgoing analysis raises serious questions as to whether even the plaintiffs with arguably federal exposure should be retained. Courts throughout the Fifth Circuit and this state have ruled that a plaintiff may defeat removal to the federal courts by disavowing claims which give rise to federal jurisdiction. *See, e.g., Caldwell v. American Home Products Corp.*, 210 F. Supp. 2d 809 (S.D. Miss. 2002); Walker v. Atwood Chevrolet-Olds, Inc., 189 F. Supp. 2d 594 (S.D.

Mississippi 2001); Hardmon v. City of Clarksdale, No. 2:97CV32-S-B, 1998 WL 378380 (N.D. Miss. May 21, 1998). The Court, however, has taken the plaintiffs' original motion to remand under advisement and will render a decision in due course.

Conclusion

For the forgoing reasons, the Court finds that the plaintiffs' motion and supplemental motion for expedited remand of the non-federal-question plaintiffs are well-taken and shall be granted. An order will issue accordingly.

This, the _____ day of October, 2002.

NEAL B. BIGGERS, JR.
SENIOR U.S. DISTRICT JUDGE

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ORDER

Pursuant to the memorandum opinion issued simultaneously herewith, it is **ORDERED** and **ADJUDGED** that the twenty-seven plaintiffs identified in Exhibit A of the plaintiffs' supplemental motion for expedited remand are **SEVERED** from the remaining plaintiffs in this cause. It is further **ORDERED** and **ADJUDGED** that this cause, absent the claims of the aforesaid twenty-seven plaintiffs, be and the same is hereby remanded to the court from whence it came.

This, the _____ day of October, 2002.

NEAL B. BIGGERS, JR.
SENIOR U.S. DISTRICT JUDGE